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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

THE KIOWA TRIBE OF OKLAHOMA

Petitioner,

v.

MANUFACTURING TECHNOLOGIES, INC.,
an Oklahoma corporation,

Respondent.

On Petition for a Writ of Certiorari
to the Court of Appeals, Division I,
for the State of Oklahoma

PETITION FOR A WRIT OF CERTIORARI

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December 23, 1996

43 P/P

(i)

QUESTIONS PRESENTED

Whether, under the Indian Commerce Clause, a federally recognized Indian tribe that has not waived its sovereign immunity, is subject to the "inherent jurisdiction" of a state court because the commerce from which the suit arises took place, in part, outside tribal territory?

Whether, under the Indian Commerce Clause and the Treaty Clause, state jurisdiction over Indian tribes can be limited solely by an explicit "ouster" of that jurisdiction by Congress?

(ii)

LIST OF PARTIES

The Kiowa Tribe of Oklahoma
Petitioner/Defendant

Manufacturing Technologies, Inc., an Oklahoma corporation
Respondent/Plaintiff

(iii)

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OF OKLAHOMA COUNTY, OKLAHOMA

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OF OKLAHOMA

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WESTERN DISTRICT OF OKLAHOMA

(v)

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No. _____

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THE KIOWA TRIBE OF OKLAHOMA

Petitioner,

v.

**MANUFACTURING TECHNOLOGIES, INC.,
an Oklahoma corporation,**

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS, DIVISION I,
FOR THE STATE OF OKLAHOMA**

**Petitioner, The Kiowa Tribe of Oklahoma,
respectfully prays that a writ of certiorari issue to review
the decision of the Court of Appeals, Division I, State of
Oklahoma entered on June 28, 1996.**

OPINION BELOW

The opinion below was from the Court of Appeals of the State of Oklahoma, Division I. It was not published. The case was styled *Manufacturing Technologies, Inc. v. Kiowa Tribe of Oklahoma*, No. 86,489. It was entered June 28, 1996. The text of this opinion is reproduced in the Appendix. The Oklahoma Supreme Court denied the Kiowa Tribe of Oklahoma's certiorari petition on September 25, 1996, without opinion.

JURISDICTION

The opinion of the Oklahoma Court of Appeals was entered June 28, 1996. Certiorari was denied by the Oklahoma Supreme Court on September 25, 1996. This Court's jurisdiction to consider this petition from the final judgment or decree by the highest court of the state in which the decision could be had is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS

Article I, Section 8, Clause 3 of the United States Constitution:

"The Congress shall have Power . . .

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . ."

Article II, Section 2, of the United States Constitution:

"[The President] shall have Power, by and with the advice and consent of the Senate, to make Treaties . . ."

STATEMENT OF THE CASE

The Kiowa Tribe of Oklahoma ("Kiowa" or the "Tribe") is a federally recognized Indian tribe. Under federal law, federally recognized Indian tribes have sovereign immunity to damage suits, absent Congressional authorization or a waiver by the tribe.

In 1990, the Tribe purchased from Manufacturing Technologies, Inc. ("Manufacturing") a portion of the shares of stock of an Oklahoma business corporation called Clinton-Sherman Aviation, Inc. The Tribe gave its promissory note as consideration for the purchase of the shares.

The Tribe did not waive its immunity to damage suits or otherwise consent to be sued in any court. Instead, the Tribe expressly reserved its sovereign rights. The promissory note states:

Nothing in this Note subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma. (R. at A, p. 3.)¹

The Tribe defaulted by failing to make scheduled note payments. Manufacturing sued the Tribe in the District Court of Oklahoma County, State of Oklahoma, seeking a money judgment.

The Tribe raised its federally recognized immunity to suit on a motion to dismiss. (R. at B.) Throughout the case, it consistently raised its sovereign immunity as a defense. The district court rejected the sovereign immunity defense and entered judgment against the Tribe for \$445,470.83, in principal and interest.

The Oklahoma Court of Appeals affirmed the trial court's judgment. It relied upon the Oklahoma Supreme Court's decisions in *Hoover v. Kiowa Tribe of Okla.*, 909 P.2d 59 (Okla. 1995) *cert. denied* ___ U.S. ___, 116 S.Ct. 1675, 134 L. Ed 2d 799 (1996) and *First Nat'l. Bank v. Kiowa, Comanche and Apache Intertribal Land Use Committee*, 913 P.2d 299 (Okla. 1996) for the ruling that, if an Indian tribe engages in commerce outside Indian Country, then a state court has inherent jurisdiction over the tribe,

¹ References to ("R.") are to the record on appeal in *Manufacturing Technologies, Inc. v. Kiowa Tribe of Oklahoma*, No. 86,489, the Court of Appeals of the State of Oklahoma.

unless that state court jurisdiction has been "ousted" by affirmative action of Congress.

REASONS FOR GRANTING THE WRIT

THE OKLAHOMA COURT OF APPEALS DECIDED AN ISSUE OF INDIAN TRIBAL SOVEREIGNTY IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT AND CONFLICTS WITH 'OVERRIDING' CONGRESSIONAL GOALS OF TRIBAL ECONOMIC DEVELOPMENT.

Commerce and relations with Indian tribes are the exclusive province of federal law. United States Constitution, Article I, sec. 8, cl. 3; Article 2, sec. 2; *Oneida County, N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 105 S.Ct. 1245, 1251, 84 L.Ed.2d 169 (1985). States have been divested of virtually all authority over Indian commerce and Indian tribes. *Seminole Tribe of Fla. v. Fla.*, 517 U.S. ___, 116 S.Ct. 1114, 1126, 134 L. Ed. 2d 252 (1996). The definition of Indian tribal sovereignty is also a matter of federal law. *Iowa Mutual Ins. Co. v. La Plante*, 480 U.S. 9, 107 S.Ct. 971, 975, 94 L.Ed.2d 10 (1987). This Court has repeatedly defined tribal sovereignty to include immunity from suit, absent Congressional or tribal consent. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 1677, 56 L.Ed.2d 106 (1978). This Court relied upon long-established

traditional concepts of sovereignty to hold that consent alone creates jurisdiction over a sovereign. *United States v. Testan*, 424 U.S. 293, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976). Without consent, any attempted exercise of judicial power over a tribal sovereign is void. *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 60 S.Ct. 653, 656, 84 L.Ed. 894 (1940). There is no federal law to support Oklahoma's decision that it has "inherent jurisdiction" over an Indian tribe if the suit arises from commerce outside Indian Country and there has been no Congressional "ouster" of Oklahoma's jurisdiction.

Encouraging tribal self-government and economic development is an "overriding goal" of Congress. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083, 1092, 94 L.Ed.2d 244 (1987). Tribal sovereign immunity is essential to promote the federal policies of fostering tribal self-determination and economic development. It allows tribes to regulate, by contract, the extent of economic risk assumed in commerce.

This Court's most recent case on tribal immunity to damage suits reiterated that, absent consent, a court has no jurisdiction over Indian tribes. In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) the State of Oklahoma proposed that the immunity doctrine, as defined in *United States Fidelity & Guaranty* be abandoned or substantially modified. This Court refused "to modify the long-established principle of tribal sovereign immunity" in response to the Oklahoma Tax Commission's attempt to recover a money judgment against an Indian tribe.

In this case, the Oklahoma Court of Appeals did what this Court refused to do in *Citizen Band*. It re-makes basic federal law by ignoring both *United States Fidelity & Guaranty* and *Citizen Band* and refuses to recognize tribal sovereign immunity. The Oklahoma Court of Appeals' decision also ignores Congress' use of tribal sovereign immunity in pursuit of its overriding goal of promoting tribal self-government and economic development. Congress enacted a statutory scheme for federal Indian relations which specifically includes tribal immunity as a part of its policy. See 25 U.S.C. § 450N(1) (tribal immunity to suit expressly preserved).

The importance of requiring states to follow federal law on tribal sovereign immunity is fully understood when this case is considered against the backdrop arising from Kiowa's attempt to purchase all of the shares of Clinton-Sherman Aviation, Inc. This case is but one of many filed by various individuals or entities that were given Kiowa's promissory notes as consideration for the purchase of corporate shares of Clinton-Sherman Aviation, Inc. *In all of these notes, Kiowa specifically reserved its sovereign rights.* Despite the reservation of sovereign rights, the Oklahoma state courts assumed jurisdiction and entered judgments against Kiowa. These cases represent the first time that Oklahoma courts have concluded that it was proper to ignore an Indian tribe's federally recognized sovereign immunity to suit. See *Hoover*, 909 P.2d at 59; *Aircraft Equipment Co. v. Kiowa Tribe of Okla.*, 921 P.2d 359 (Okla. 1996); *Carl E. Gungoll Exploration Joint Venture v. Kiowa Tribe of Oklahoma*, No. 87,031, Supreme Court of

Oklahoma; *JB Investment Corp. v. Kiowa Tribe of Oklahoma*, No. 87,032, Supreme Court of Oklahoma.

The total judgments, including interest and attorney fees, exceed \$1,500,000.00. Admittedly, neither the judgments in the other cases nor the efforts to collect them are directly challenged in this case. Reviewing them, however, is helpful to understanding the impact of Oklahoma's decision to ignore federal law and disregard Kiowa's immunity to suit.

Attempts to collect these judgments generated a second wave of litigation between Kiowa and the judgment creditors. This wave of litigation shows that Oklahoma's destruction of Kiowa's sovereign immunity places federal Indian policy in the hands of the State of Oklahoma. In two instances, the judgment creditors used state court process to seize Kiowa's tribal tax revenues. See *Aircraft Equipment Co. v. Kiowa Tribe of Okla., et al.* No. 86,184, Supreme Court of Oklahoma [challenging seizure of severance tax revenues and enjoining enforcement of tribal tax laws]; *Aircraft Equipment Co. v. Kiowa Tribe of Okla.*, No. 85,272, Supreme Court of Oklahoma [challenging seizure of Kiowa's severance tax revenues through use of state court garnishment] As yet, the Oklahoma Supreme Court has not issued its opinion with respect to a state court's authority to seize tribal funds. But, the funds are being seized, as appeals await decision. These funds would have been used in Kiowa's self government. The loss of these funds necessarily reduces tribal governmental operations.

In two other cases, state court garnishments have been used to seize Kiowa's bank accounts, which hold tribal tax revenues, tribal funds paid to Kiowa by the United States pursuant to 25 U.S.C. § 1401 *et seq.* (Indian Tribal Judgment Funds Use or Distribution Act²) and 25 U.S.C. § 450 *et seq.* (Indian Self Determination And Education Assistance Act³) See *Robert M. Hoover, Jr. v. Kiowa Tribe of Okla. v. The First Nat'l. Bank of Mountainview, Okla., Garnishee*, No. CIV-96-1624-L, United States District Court for the Western District of Oklahoma (prior to removal, CJ-91-667 District Court of Oklahoma County, Oklahoma) and *Carl E. Gungoll Exploration Joint Venture v. Kiowa Tribe of Okla. v. Anadarko Bank & Trust Co., Garnishee*

² 25 U.S.C. § 1401 regulates the use and distribution of funds appropriated in satisfaction of judgments of the Indian Claims Commission or the United States Court of Federal Claims in favor of Indian tribes. Pursuant to § 1403(b)(5), a "significant portion" of the funds are reserved for "common tribal needs, educational requirements and such other purposes as the circumstances of the affected Indian tribe may justify."

³ 25 U.S.C. § 450(a) declares federal policy to assure maximum Indian participation in the direction of educational as well as other federal services to Indian communities. Pursuant to the Act, the federal government contracts with tribes to administer various social programs. Federal funds are provided for tribal administration of these programs. This Act specifically preserves tribal sovereign immunity at § 450N(1).

No. CIV-96-2059-T, United States District Court for the Western District of Oklahoma (prior to removal, CJ-90-10166, District Court of Oklahoma County). Again, these are funds that were intended to run the Kiowa tribe. Their loss necessarily diminishes Kiowa's ability to function as a government.

Currently, over \$ 450,000.00 of Kiowa's tribal funds have been seized by state court process. The seized funds include federal monies allocated for a housing improvement program, food distribution and higher education. Of course, none of these funds can be used by the Tribe.

While these cases are ongoing, the Tribe sought protection from garnishment of its assets with its own suit for injunctive and declaratory relief in federal court. Kiowa asked the United States District Court for the Western District of Oklahoma to recognize its immunity to suit, as a matter of supreme federal law and stop the state court from seizing its tribal assets. The federal court refused to grant Kiowa a preliminary injunction and dismissed its suit on the basis of *Rooker/Feldman* abstention. The United States District Court ruled that Kiowa's sole remedy is to seek review by the United States Supreme Court under 28 U.S.C. § 1257.⁴ *Kiowa Tribe of Okla. v. Robert M. Hoover et al.*, CIV-96-0843, United States District Court for the Western District of Oklahoma [denial of preliminary injunction on appeal as *Kiowa Tribe of Oklahoma v. Robert M. Hoover, et al.*, No. 96-6278, United States Court of Appeals for the

⁴ The text of the Order is reproduced in the Appendix.

Tenth Circuit; dismissal of Kiowa's case on appeal as *Kiowa Tribe of Okla. v. Robert M. Hoover et al.*, No. 96-6401, United States Court of Appeals for the Tenth Circuit].⁵

The Tenth Circuit, when asked to stop seizure of Kiowa's assets with an injunction pending appeal, refused the request with the observation that, "This case involves ongoing state court proceedings and should remain in that forum." Order of October 10, 1996, issued in *Kiowa Indian Tribe of Okla. v. Hoover, et al.*, No. 96-6278, United States Court of Appeals for the Tenth Circuit.

Thus, Kiowa is in the difficult position of having state courts refuse to honor its federally recognized immunity to suit and seize its funds used run the tribal government, while the United States District Court and the Tenth Circuit abstain from jurisdiction, suggest that the matter remain in state court and refer Kiowa to this Court as its sole remedy. The suggestion that Kiowa continue legal resistance in state court may be an attractive alternative to federal interference with state court judgments. It may be particularly attractive to a federal court that expects a state court to realize that states "have been divested of virtually all authority over Indian commerce and Indian tribes." *Seminole Tribe of Fla.*, 116 S.Ct. at 1126. But, it is a suggestion that is blind to the reality of Oklahoma's position.

Kiowa has no hope of the Oklahoma Supreme Court concluding that it does not, in fact, have "inherent

⁵ The text of the Order is reproduced in the Appendix.

jurisdiction" over an Indian tribe. The Oklahoma Supreme Court makes it obvious and certain that it believes it has "inherent jurisdiction" over an Indian tribe. *Hoover*, 909 P.2d at 62; *First Nat'l. Bank*, 913 P.2d at 300; *Aircraft Equipment Co.*, 921 P.2d at 361. Oklahoma has gone so far as to declare this issue a "state law question" and to conclude that its position was vindicated by this Court's denial of certiorari in *Hoover*. *Aircraft Equipment Co.*, 921 P. 2d at 361. At best, Kiowa can hope only that Oklahoma will conclude that it cannot seize tribal assets and thereby cripple tribal government. But, if Oklahoma is willing to render a judgment against an Indian tribe, will Oklahoma likely next say that its judgment cannot be enforced?

Further, in deciding whether to grant a certiorari writ, it might appear attractive to await the results of Kiowa's own suit in federal court. But, that is an idea that requires both time and events to await a long court process that may yield no relief when it does act. The United States District Court has already refused to take jurisdiction and the Tenth Circuit says that the matter should be left to the state courts. It will be difficult at best for Kiowa to obtain a reversal of an abstention ruling by securing a decision from the Tenth Circuit, which already stated that the matter should remain in state court. In the event that Kiowa should succeed in the Tenth Circuit, then the best it can hope for is to be remanded for further proceedings before the District Court. In the meantime, Kiowa's government must function on a daily basis. It cannot go on "hold" while the court process continues. The programs it runs are designed to meet the daily needs of tribal members.

Admittedly, from this mare's nest of litigation, Kiowa could eventually emerge with a ruling from the Oklahoma Supreme Court that Oklahoma must respect Kiowa's tribal treasury. Possibly, Kiowa may eventually secure from the Tenth Circuit or the United States District Court a ruling that limits Oklahoma to its proper Constitutional powers. But, it is not necessary to consign Kiowa to the task of battling an array of intense state and federal litigation that drains its coffers and paralyzes its government. All Kiowa asks is that Oklahoma respect the sovereign immunity this Court has regularly and clearly recognized.

Stated strictly in legal terms, the State of Oklahoma refuses to recognize Constitutional limitations upon its power over Indian tribes. It plainly ignores federal law that provides that an Indian tribe is not subject to the jurisdiction of a state court, unless either the tribe or Congress has authorized that state jurisdiction. But, stating the issue as a legal problem drains the issue of the urgency that is gained from the press of daily reality. The problem is that Oklahoma, having declared its own jurisdiction over a federally recognized Indian tribe and having started seizing tribal funds to satisfy judgments, is denying to the tribe the money it uses for self-government. In fact, Oklahoma is seizing federal funds appropriated for tribal self-government. When the tribe loses its tax revenues, its federal judgement funds and its federal self-determination funds, the tribe loses its capacity to function as a sovereign entity. This result is destructive of Congress' overriding goal of encouraging tribal self-government.

Oklahoma has thirty-six federally recognized Indian tribes within its borders, and thus, Oklahoma's new position on Indian sovereignty involves tribes other than Petitioner. Many of these thirty-six Indian tribes will find that virtually all of their commerce must necessarily occur, at least in part, outside tribal territory. This is because, in many instances, tribal territory is either too small or too remote to be conducive to commerce that can remain exclusively within tribal territory. As a practical matter, many tribes cannot engage in any commerce completely upon tribal territory and, as a result, those tribes may lose all immunity.

Doubtlessly, Oklahoma is significantly troubled by the chore of running a state government and making the unique concessions it must make to accommodate federal Indian tribe policy. But, Oklahoma's frustration cannot be allowed to boil over to the point that Oklahoma can ignore Constitutional limits on its powers and eliminate an essential element of federal policy. A doubtful determination of an important question of state power over Indian affairs is reason for granting certiorari. *Williams v. Lee*, 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959).

**THERE IS A CONFLICT BETWEEN A
DECISION OF THE OKLAHOMA
COURT OF APPEALS AND A DECISION
OF THE COURT OF APPEALS FOR THE
TENTH CIRCUIT ON THE ISSUE OF
TRIBAL IMMUNITY TO DAMAGE
SUITS.**

The Tenth Circuit recognizes that, as a matter of federal law, an Indian tribe is immune to damage suits, absent a clear waiver by the tribe or Congressional abrogation. *Bank of Okla. v. Muscogee (Creek) Nation*, 972 F.2d 1166 (10th Cir. 1992). This holding is consistent with a long line of decisions by this Court. *Santa Clara Pueblo*, 98 S.Ct. at 1677; *United States Fidelity & Guaranty Co.*, 60 S.Ct. at 656.

Recently, the Tenth Circuit held that, in the absence of tribal or Congressional waiver of immunity, tribal immunity to damage suits applied to a tribe's conduct of commerce outside of tribal territory. *Sac & Fox Nation v. Hanson*, 47 F.3d 1061 (10th Cir. 1995) *cert. denied* ___ U.S. ___, 116 S.Ct. 57, 133 L.Ed.2d 21 (1995). In so doing, the Tenth Circuit addressed a question raised in the *Citizen Band* concurring opinion as to whether a tribe's immunity is limited by geographical boundaries. *Citizen Band*, 111 S.Ct. at 912. The Tenth Circuit answered the question in a manner consistent with long established, clearly articulated precedent from this Court. It found there was no geographical limit to the nature of a sovereign.

In this case, the Oklahoma Court of Appeals also answered the question of whether tribal immunity has geographical limits. Despite *Hanson* and a legion of cases from this Court, the Oklahoma Court of Appeals reached the opposite conclusion. It held that tribal immunity does not apply to a damage suit arising from a tribe's conduct of commerce outside tribal territory. The absence of the federally required waiver of immunity, and the presence of an express reservation of sovereign rights, were immaterial.

The Oklahoma Court of Appeals' decision and the decision of the Tenth Circuit are in direct conflict. Either court would have decided the other court's case in an exactly opposite way.

This direct conflict is particularly acute because it raises the question of whether state judicial power concerning tribal immunity is limited by federal law. *Hanson*, in which a federal court enjoined a state trial court from exercising jurisdiction over a tribe, makes plain the extent of the problem of this conflict. Unless there is resolution of these two conflicting decisions, tribes that wish to protect their federally recognized rights will be forced to seek federal court relief. If the District Court for the Western District of Oklahoma is correct about its lack of power to protect Indian tribes' federal rights, that relief can come only from this Court acting under 28 U.S. C. § 1257. With thirty-six federally recognized Indian tribes in Oklahoma, more cases are bound to follow.

It is not desirable to allow this conflict to continue unresolved and generate a series of federal suits and petitions

for certiorari. This Court should grant certiorari to provide a resolution of this conflict for both the Oklahoma Court of Appeals and the Court of Appeals for the Tenth Circuit.

**THE OKLAHOMA COURT OF APPEALS
DECIDED A QUESTION OF TRIBAL
SOVEREIGN IMMUNITY WHICH HAS
NOT, BUT SHOULD BE, DECIDED BY
THE SUPREME COURT.**

If there are to be geographical limits on tribal immunity and an expansion of state authority over Indian tribes, then those changes should come from this Court or from Congress, not from state courts declaring their own powers. Such a change should come from the federal government because commerce with Indian tribes and definition of the nature of tribal sovereignty are matters of federal law. United States Constitution Art. 1, sec. 8, cl. 3; *La Plante*, 107 S.Ct. at 975.

Review of this case presents the opportunity to set a clear uniform precedent and allow tribes, persons engaging in commerce with tribes, and states to understand the nature and extent of their rights and powers.

CONCLUSION

For the reasons above, the writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

**NOT FOR PUBLICATION
THE COURT OF APPEALS OF
THE STATE OF OKLAHOMA**

DIVISION I

MANUFACTURING TECHNOLOGIES,)
INC., an Oklahoma Corporation,)
Appellee,)
vs.) Case #86,489
KIOWA TRIBE OF OKLAHOMA,)
Appellant.)

**APPEAL FROM THE DISTRICT COURT
OF OKLAHOMA COUNTY, OKLAHOMA**

HONORABLE LEAMON FREEMAN, JUDGE

AFFIRMED

R. Brown Wallace,
Oklahoma City, Oklahoma For Appellant

John E. Patterson,
Oklahoma City, Oklahoma For Appellee

MEMORANDUM OF OPINION

Opinion by Carl B. Jones, Judge:

This appeal presents an issue of Indian tribal sovereignty - does a state court have jurisdiction to hear a claim and enter a judgment for damages against a federally recognized Indian tribe which has not waived its sovereign rights. The answer under these facts is yes.

This was suit upon a note. Appellant, Kiowa tribe, executed a promissory note to Appellee in the principal amount of \$285,000.00 to finance tribe's purchase of stock in another corporation, Clinton-Sherman Aviation, Inc. Payment was not made as required by the note, resulting in this action for the principal amount of \$285,000.00, and the accrued interest. Appellee filed a motion for summary judgment. Appellant tribe responded to the motion for summary judgment, admitting that the note was in default. Tribe only objected to the motion for summary judgment on the ground that it is a federally recognized Indian tribe, that it had not waived its sovereign immunity, and that it was therefore immune from damage suits in state courts. Summary judgment was granted to Appellee in the requested amount of \$285,000.00, and accrued interest in the amount of \$160,470.83. Subsequently, Appellee was awarded an attorney fee in the amount of \$7,185.00 and costs of \$94.00. Tribe appeals the award of attorney fees on the same grounds as its appeal of the underlying judgment.

For purposes of the motion for summary judgment, the facts were undisputed. The issue here is one of law.

This appeal has been perfected under the accelerated procedures of Rule 1.203(A), Rules for Appellate Procedure in Civil Cases, 12 O.S. Supp. 1993, Ch. 15, App. 2.

Our Supreme Court has recently decided two similar cases, both involving the Kiowa tribe, which are dispositive of the issue here. In *Hoover v. Kiowa Tribe of Oklahoma*, 909 P.2d 59 (Okla. 1995), *cert. denied*, 116 S.Ct. 1675 (1996), the tribe had executed a promissory note to Appellant secured by 5,000 shares of stock in Clinton-Sherman Aviation, Inc. The tribe defaulted and the stock was sold at auction. Appellant's lawsuit followed, presumably for a deficiency judgment. The trial court granted tribe's motion to dismiss, finding that having not been waived, the doctrine of sovereign immunity applied, and concluding that the state court was without jurisdiction. The Oklahoma Supreme Court reversed, finding persuasive the reasoning of the New Mexico Supreme Court in *Padilla v. Pueblo of Acoma*, 107 N.M. 174, 754 P.2d 845 (1988), *cert. denied*, 490 U.S. 1029, 109 S.Ct. 1767 (Because the policy of New Mexico allowed breach of written contract actions against the state, state courts may exercise jurisdiction over an Indian tribe engaged in off-reservation activities for breach of contract.) *Hoover* points out that Oklahoma, like New Mexico, permits breach of contract suits against the state. *Hoover*, 909 P.2d at 62. It accordingly holds that because this litigation was not expressly prohibited by Congress and does not infringe on tribal self-government, contracts between and Indian tribe and a non-Indian may be enforced in state court.

Regarding the applicability of *Hoover*, Appellee tribe only argues that the opinion's reliance on the New Mexico *Padilla* case is flawed because a New Mexico Court of Appeals decision, *DeFeo v. Ski Apache Resort*, 904 P.2d 1065 (N.M. Ct. App. 1995) has criticized it. Regardless of criticism, *Padilla* is still the law in New Mexico and *Hoover* is now the law in Oklahoma. This Court will not presume to second guess the reasoning of our Supreme Court.

An even more recent decision in this state reaffirming its holding in *Hoover* is *First Nat'l Bank in Altus v. Kiowa, Comanche, and Apache Intertribal Land use Committee*, 913 P.2d 299 (Okla. 1996). The court there answered affirmatively the question of "... whether a contract between a tribal enterprise engaged in commercial activity outside Indian county and a non-Indian may be enforced in state court."

As the law now exists in Oklahoma, there appears no doubt that the promissory note at issue may be enforced in state court, the doctrine of sovereign immunity notwithstanding. The underlying judgment is accordingly affirmed. Likewise, the order awarding attorney fees and costs to Appellee is affirmed for the same reasons.

AFFIRMED.

GARRETT, J., and JOPLIN, J., concur.

UNITED STATES COURT OF APPEAL
FOR THE TENTH CIRCUIT

KIOWA INDIAN TRIBE OF)	
OKLAHOMA, a federally)	
recognized Indian Tribe,)	
)	
Plaintiff-Appellant,)	
)	
vs.)	No. 96-6278
)	
ROBERT M. HOOVER, JR., an)	
individual; AIRCRAFT EQUIPMENT)	
COMPANY, a joint venture formed)	
under the laws of Oklahoma;)	
JOHN M. AMICK, in his capacity)	
as a District Judge, State of)	
Oklahoma; JAMES B. BLEVINS, in)	
his capacity as a District Judge,)	
State of Oklahoma,)	
)	
Defendants-Appellees.)	

ORDER

Before TACHA, BALDOCK, and MURPHY, Circuit Judges

This matter is before us for consideration of appellant's request for a preliminary injunction to Fed. R. App. P. 8, pending appeal of the district court's denial of a preliminary injunction. Following a hearing, the district court denied injunctive relief based on appellant's failure to demonstrate irreparable harm.

The grant or denial of an injunction is within the trial court's discretion, see Tri State Generation v. Shoshone River Power, Inc., 805 F.2d 351, 354 (10th Cir. 1986), and this court may set aside its denial only for error of law, abuse of discretion, and clear error in factual findings. Autoskill Inc. v. National Educ. Support Sys., Inc., 994 F.2d 1476, 1487 (10th Cir.), cert. denied, 114 S. Ct. 307 (1993). The elements to be demonstrated before the district court in considering a preliminary injunction are the same as those for a stay. To be entitled to a stay pending appeal, an appellant must show (1) the likelihood of success on the merits on appeal; (2) irreparable harm to the appellant if the stay is not granted; (3) other parties will not be substantially harmed by the entry of stay; and (4) the public interest favors a stay. See Hilton v. Baunskill, 481 U.S. 770, 776 (1987); United States v. Various Tracts of Land in Muskogee & Cherokee Counties, 74 F.3d 197, 198 (10th Cir. 1966); see also 10th Cir. R. 8.1.

We have evaluated appellant's application under the four-part test and have determined it has failed to meet the required criteria. In particular, the claims of the likelihood of success on the merits and irreparable harm are insufficient to warrant the relief sought.

This case involves ongoing state court proceedings and should remain in that forum.

Accordingly, the application for injunction pending appeal is denied.

Entered for the Court
PATRICK FISHER, Clerk

By _____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

KIOWA INDIAN TRIBE OF)	
OKLAHOMA, a federally)	
recognized Indian Tribe,)	
)	
Plaintiff,)	
)	
vs.)	No. CIV-96-843-C
)	
ROBERT M. HOOVER, JR., an)	
individual, et al.)	
)	
Defendants.)	

MEMORANDUM OF OPINION

This matter comes before the Court on the motion of defendants, Robert M. Hoover, Jr. and Aircraft Equipment Co. to dismiss the claims of plaintiff, The Kiowa Tribe of Oklahoma (the Tribe). Defendants challenge plaintiff's claims and this Court's jurisdiction asserting that plaintiff seeks relief which is barred by the federal Anti-Injunction Statute, 28 U.S.C. § 2283, and that plaintiff is improperly asking this Court to sit in an appellate capacity contrary to the Rooker-Feldman abstention doctrine. The court also

concludes that the Younger abstention doctrine is implicated by the facts and procedural history of this case.

I. Background

The case before this Court following extensive state court and tribal court litigation in which plaintiff, a federally recognized Indian tribe, was found liable to defendants, Robert Hoover and Aircraft Equipment Company, for defaulting on its obligation under a promissory note. At all states of the litigation, the Tribe has raised the defense of sovereign immunity to the claims of its creditors.

In the initial case at the state court level (the Hoover Litigation) Robert Hoover filed suit against the Tribe for damages arising out of the Tribe's failure to honor the promissory note. Defendant Oklahoma District Judge James Blevins presided over this litigation. The second case (the Aircraft Equipment Litigation) also concerned the same note as the Hoover Litigation, but in this case, Aircraft alleged that the Tribe's failure to pay Hoover was a breach of an assumption agreement between Aircraft and the Tribe. Defendant Oklahoma District Judge Ricks presided over those proceedings. These cases ultimately resulted in two opinions from the Supreme Court of Oklahoma wherein that court rejected the notion that Indian tribes possess sovereign immunity when engaging in off-reservation commercial activities. Aircraft Equipment Co. v. Kiowa Tribe of Oklahoma, 921 P.2d 359 (Okla. 1996); Hoover v. Kiowa Tribe of Oklahoma, 909 P.2d 59 (Okla. 1995), cert. denied, --- U.S. ---, 116 S.Ct. 1675 (1996). These opinions, however, are in direct conflict with precedent from the

United States Court of Appeals for the Tenth Circuit. Sac and Fox Nation v. Hanson, 47 F.3d 1061 (10th Cir. 1995), cert. denied, --- U.S. ---, 116 S.Ct. 57 (1995) (tribal sovereign immunity extends to off-reservation commercial activities).

Following remand to the state trial courts, judgments were entered on behalf of Aircraft and Hoover. Aircraft then instituted garnishment proceedings against the Tribe and has seized tribal revenues for oil and gas severance taxes to satisfy its judgment. In addition, Aircraft has sought a creditor's bill in state court against the Tribe and various oil and gas companies. Defendant Oklahoma District Judge Amick granted the request for the creditor's bill and ordered oil and gas companies to pay any severance tax owing to the Tribe to the Oklahoma County Clerk pending the outcome of plaintiff's appeal of the ruling on the creditor's bill still pending before the Oklahoma Supreme Court. Judge Amick also issued an order enjoining the Tribe from enforcing any tribal tax laws which allow foreclosure on tax liens created by the failure of oil and gas companies to pay severance tax to the Tribe.

Plaintiff's present action is based upon 42 U.S.C. § 1983 alleging that these actions of the State of Oklahoma, Robert Hoover and Aircraft Equipment have violated plaintiff's federal sovereign immunity rights. The Tribe contends that it is therefore entitled to injunctive relief against the state court judges and monetary damages as reimbursement for the revenues it contends it lost as a result of the wrongful actions perpetrated by defendants Hoover

and Aircraft. Plaintiff also seeks punitive damages from Hoover and Aircraft.

II. Discussion

The defendants' motion to dismiss attacks plaintiff's claim for relief asserting that this Court does not have jurisdiction because it cannot decide plaintiff's claims without sitting in appellate review of Oklahoma state courts, and that the complaint seeks an injunction that is barred by the Anti-Injunction Act, 28 U.S.C. § 2283. In addition, the United States Court of Appeals for the Tenth Circuit has recently ruled federal courts have the responsibility to raise, sua sponte, the Younger abstention doctrine when applicable. The Court finds that doctrine is also implicated in the present case. Morrow v. Winslow, 94 F.3d 1386 (10th Cir. 1996); see also, Penzoil v. Texaco, 481 U.S. 1 (1987) (Younger abstention applicable when federal injunction sought against state attempt to enforce state judgment). Nonetheless, because the Court finds that plaintiff's claims constitute an improper attempt to seek review of state court judgments through federal district court, defendants' motion to dismiss must be granted. Therefore, the Court will not address the issues raised by the Younger doctrine and the Anti-Injunction Act.

Federal district courts do not have authority to review final judgments of a state court in judicial proceedings. Federal review of state judicial proceedings is only available from the United States Supreme Court. 28 U.S.C. § 1257; see District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983); Rooker v. Fidelity Trust Co., 263 U.S.

413 (1923). The United States Supreme Court has held that this nondiscretionary rule, the Rooker-Feldman doctrine, prohibits district courts from exercising jurisdiction over cases where the claims are "inextricably intertwined" with the decision of the state court, even if the complaint alleges the state court acted unconstitutionally.* Feldman, 460 U.S. at 486-87; see Facio v. Jones, 929 F.2d 541 (10th Cir. 1991); Van Sickle v. Holloway, 791 F.2d 1431, 1436 (10th Cir. 1986).

Plaintiff asks this Court to do what the Rooker-Feldman doctrine specifically prohibits -- revisit the legal conclusions of the Supreme Court of Oklahoma in Hoover and Aircraft Equipment. Plaintiff is correct that this Court has jurisdiction to hear section 1983 claims. However, "[t]he casting of a complaint in the form of a civil rights action cannot circumvent th[e Rooker-Feldman] rule." Liedtke v. State Bar of Texas, 18 F.3d 315 (5th Cir. 1994) cert. denied, -- U.S. --, 115 S.Ct. 271 (1994); see also Facio, 928 F.2d at 522-24; Van Sickle, 791 F.2d at 143. Plaintiff's complaint illustrates that its arguments in the present case and its arguments before the Oklahoma courts are indistinguishable. The factual support for plaintiff's action is entirely reliant upon the substance of the decisions

* Although plaintiff argues that the state courts' rejections of its claims of sovereign immunity rise to the level of a constitutional violation, the Court does not decide whether that characterization is accurate. See Sac and Fox Nation, 47 F.3d at 1064-65 (accepting Ninth Circuit's reading of historical foundation of sovereign immunity); In re Greene, 980 F.2d 590, 594-96 (9th Cir. 1992), cert. denied sub nom., Richardson v. Mt. Adams Furn., 510 U.S. 1039 (1994) (tribal sovereign immunity based upon two hundred years of federal common law).

of the Oklahoma Supreme Court and resulting lower court decisions on remand. (Compl. at 3-6). The complaint is, in essence, an invitation to this Court to apply the ruling of the Tenth Circuit in Sac and Fox Nation, 47 F.3d at 1064-65, to overturn the decisions of the Supreme Court of Oklahoma which specifically rejected the Tenth Circuit's reasoning therein. Therefore, the Court rules that plaintiff's complaint is "inextricably intertwined" with the state court decisions and must be dismissed for lack of jurisdiction pursuant to the Rooker-Feldman doctrine.

The motion presently under consideration was filed only by defendants Hoover and Aircraft Equipment, while defendants Judges Amick, Blevins and Ricks chose not to join in the motion. Nevertheless, plaintiff's claims against the judicial defendants are no different than those against the private defendants, with the exception that plaintiff does not seek monetary damages from the judges. Therefore, as the basis for dismissal under the Rooker-Feldman doctrine is jurisdictional, and plaintiff's claims against defendants Amick, Blevins and Ricks are "inextricably intertwined" with the state court decisions referenced above, the Court must also dismiss the action in regard to those defendants as well.

III. Conclusion

In conclusion, the Court grants defendants' motion to dismiss. Plaintiff's complaint against the private and judicial defendants is an effort to have the court review the judgment of the Supreme Court of Oklahoma -- an endeavor beyond this Court's jurisdiction. Therefore, plaintiff's complaint is dismissed as to all defendants.

IT IS SO ORDERED this ____ day of November,
1996.

ROBIN J. CAUTHRON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

KIOWA INDIAN TRIBE OF)
OKLAHOMA, a federally)
recognized Indian Tribe,)
)
Plaintiff,)

vs.)

No. CIV-96-843-C

)
ROBERT M. HOOVER, JR., an)
individual, et al.)
)
Defendants.)

JUDGMENT

Upon consideration of the pleadings herein, and as explained in the Memorandum Opinion entered this date, the Court finds that the motion to dismiss of defendants Robert M. Hoover, Jr. and Aircraft Equipment Co. should be granted, and this action is dismissed in its entirety.

DATED this ____ day of November, 1996.

ROBIN J. CAUTHRON
UNITED STATES DISTRICT JUDGE